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No. 774

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

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INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Petitioner*

v.

GENERAL ELECTRIC COMPANY AND IVAN C. McLEOD, REGIONAL DIRECTOR OF THE SECOND REGION OF THE NATIONAL LABOR RELATIONS BOARD

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

The International Union of Electrical, Radio and Machine Workers, AFL-CIO, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case, which was entered on September 8, 1966.

## OPINIONS BELOW

The opinions of the court of appeals and of the district court are not yet officially reported. They are printed respectively as Appendix A, pp. 20-25 and Appendix B, pp. 27-67 to the petition for a writ of certiorari in *McLeod* v. *General Electric Company,* No. 645, October Term 1966, now pending before this Court.

## JURISDICTION

The judgment of the court of appeals (Appendix A, p. 26, petition in No. 645, O. T. 1966) was entered on September 8, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

## QUESTIONS PRESENTED

Section 10(j) of the National Labor Relations Act empowers the Labor Board, upon the issuance of an unfair labor practice complaint, to petition a federal district court for "appropriate temporary relief or restraining order", and confers jurisdiction upon the district court, when such a petition is filed, "to grant to the Board such temporary relief or restraining order as it deems just and proper". The questions presented are:

1. Whether a district court may properly grant a temporary injunction enjoining continuance of the unfair labor practice alleged in the Board's complaint pending Board adjudication where the court finds a reasonable possibility that the Board's complaint will ultimately be sustained.

2. Whether a court of appeals may properly reverse a temporary injunction issued by a district court under Section 10(j) without any determination by the court

of appeals that the district court abused its discretion or erred in its finding that there was a reasonble possibility that the Board's complaint against the respondent would ultimately be sustained.

3. Whether there is any requirement that the temporary injunctions sought by the Board under Section 10(j) issue only to preserve the status quo or prevent irreparable injury and, if there is such a requirement, whether the temporary injunction issued here failed to meet such a requirement.

4. Whether the view of the court of appeals that the Board should have expedited its proceedings rather than have applied for a temporary injunction constituted a proper basis for reversing the temporary injunction issued by the district court.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix C, pp. 68-70, petition in No. 645, O.T. 1966.

## STATEMENT

On May 9, 1966, the International Union of Electrical, Radio and Machine Workers, AFL-CIO, hereinafter called IUE, filed a charge with the General Counsel of the National Labor Relations Board alleging that on May 4, 1966, and at all times thereafter, GE has refused to bargain collectively with IUE by refusing to meet unless IUE changed the composition of its negotiating committee (R.17a).[1]

[1] "R" references are to the Appendix to General Electric's brief in the Court of Appeals, nine copies of which were filed with the Clerk of this Court in No. 645, O.T. 1966.

On July 13, 1966, the General Counsel of the Board issued a complaint against GE alleging that GE was violating Section 8(a)(5) and (1) of the Act by refusing to recognize and meet with an IUE bargaining committee that included individuals who also represent other labor organizations which engage in collective bargaining with GE (R.17a-24a).

On July 15, 1966, the Regional Director, acting for and on behalf of the Labor Board, petitioned the United States District Court for the Southern District of New York for a temporary injunction restraining GE from its continued violation of Section 8(a)(1) and (5) of the Act pending the final determination of the complaint by the Board (R.7a-16a). The district court held an evidential hearing from July 25 through 29, 1966 (R.42a-422a) and on August 18, 1966, handed down an opinion containing findings of fact and conclusions of Law (R.642a-684a), and on August 23, 1966, issued a temporary injunction (R.3a-4a). The Court of Appeals for the Second Circuit reversed (pp. 20-25, petition in No. 645, O.T., 1966). On September 21, 1966, Mr. Justice Harlan stayed execution of the court of appeals' judgment pending the filing of a petition for a writ of certiorari by the Regional Director and its disposition by this Court, provided a petition was filed by October 24, 1966 (pp. 71-73, petition in No. 645, O.T. 1966).

### A. The Facts

GE is engaged in the manufacture, sale and distribution of electrical and electronic equipment, chemicals, plastics and other items, including a variety of products for national defense and atomic energy programs.

(Op. R.643a; R.56a, 59a-61a).[2] GE officials consider it the most diversified large corporation in the country, it being engaged in 15 of the basic 21 industries listed by the Department of Commerce (R.330a).

GE has approximately 290,000 employees, distributed over 60 plants spread through 30 states and more than 400 other installations (service establishments, warehouses, etc.) so that it operates in every state in the Union (Op. R.643a; R.330a). About half of its employees are organized (Op. R.643a; R.331a). These are distributed in about 150 bargaining units represented by some 80 unions (Op. R.643a; R.331a-333a).

The IUE has been certified as the bargaining representative of about 80,000 of GE's employees in some 65 to 70 different GE plants (Op. R.643a; R.56a; 331a). GE has for many years maintained national agreements with IUE applicable on a chain-wide basis to all plants for which IUE is the certified representative or becomes so certified during the term of the agreement (Op. R.643a; R.34a, 329a, 332a-334a; Bd. Exh. 3, p. 1. R.44a).

Although the IUE signed national agreements with GE in 1958, 1960 and 1963, the IUE regarded the terms which GE imposed on it in these agreements as "disasterous" (R.164a). Unfair labor practice charges, alleging among other things that the Boulware technique of playing the unions off against each other to obtain acceptance of terms unilaterally devised by GE constituted a violation of Section 8(a)(1) and (5),

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[2] References to the opinion of the district court are designated by the prefix "Op." followed by the pages of the appendix where the pertinent parts of the opinion is printed. The references following the citation to the opinion are to the supporting evidence.

were filed as to both the 1960 and 1963 negotiations. The Board sustained these charges as to the 1960 negotiations in *Matter of General Electric,* 150 N.L.R.B. 192, now pending in the United States Court of Appeals for the Second Circuit upon the Labor Board's petition for enforcement and GE's petition for review.[3] Both the IUE and the Steelworkers filed charges alleging that GE's similar applications of its Boulware techniques in the 1963 negotiations constituted an illegal refusal to bargain in good faith (NLRB Case No. 2-CA-9587). These charges are still pending undecided before the Labor Board.

Beginning in 1960 the IUE and various of the other unions representing GE employees attempted to develop some form of cooperation which would achieve for their members true collective bargaining (R.181a, 184a, 186a-188a). In 1966 this cooperation developed to the point of each of seven cooperating unions appointing to its respective negotiating committee, a representative from each of the other cooperating unions (Op. R.659a; R.49a-50a, 101-102a, 158a, 263a, 292a). This form of cooperation between unions had been accepted by the motor industry, as for instance in negotiations between UAW and General Motors,

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[3] The District Court in the instant case took judicial notice of these prior Board proceedings (R. 143a). The right of the IUE to intervene in the review and enforcement proceedings in the Court of Appeals and to file its own petition for review was before this Court in *International Union of Electrical, Radio and Machine Workers* v. *N.L.R.B.*, 382 U.S. 366, granting certiorari, vacating and remanding orders entered by the United States Court of Appeals for the Second Circuit without opinion which denied intervention and dismissed IUE's petition. The refusal of the Court of Appeals after remand to permit IUE to maintain review proceedings, 358 F. 2d 292, led to the petition for certiorari in No. 341, this Term, which was denied October 17, 1966.

IUE representatives had served on a UAW bargaining committee (R.175a-176a, 203a-204a, Tr. 557-562), and had received the approval of the Labor Board[4] and the United States Court of Appeals for the Sixth Circuit.[5]

GE refused to meet with the IUE-negotiating committee so long as it included representatives from other unions (Op. 660a-661a; R.51a-52a; 338a-342a, 355a-356a, 366a-367a). The IUE accordingly filed the unfair labor practice charge which initiated these proceedings (R.17a).

### B. The Decision of the District Court

The district court held that GE had no legal justification for its refusal to meet with the IUE committee expanded by inclusion of representatives of other unions, that there is compelling ground to expect eventual findings by the Board that GE violated Section 8(a)(1) and (5) of the Act by its refusal to meet and that a preliminary injunction requiring GE to meet with the expanded IUE committee is just and proper (Op. R.663a). Characterizing the case in its substantive aspect as presenting "the boldest and most explicit form of refusal to bargain" (Op. R. 665a), the court found that there was no basis in the record for finding any exception to the well established principle that neither employer nor union may veto

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[4] *Standard Oil Co.*, 137 NLRB 690 (1961) enforced, 6th Cir., 1963, 322 F. 2d 40; *American Radiator & Standard Sanitary Corp.*, 155 NLRB No. 69 (1965) Cf. *Prudential Ins. Co.*, 124 NLRB 1390, 1396, enf'd in this respect 3rd. Cir., 1960, 278 F. 2d 181.

[5] *Standard Oil Company* v. *N.L.R.B.*, 6th Cir., 1963, 322 F. 2d 40; compare *U.S. Pipe & Foundry* v. *N.L.R.B.*, 5th Cir., 1962, 298 F. 2d 873, certiorari denied, 370 U.S. 919.

the other's choice of bargaining representatives (Op. R.666a-675). The court pointed out that the Sixth Circuit 1963 holding in *Standard Oil Company* v. *N.L.R.B.*, 322 F.2d 40 "rejected an employer position undistinguishable in principle from the one pressed here" (Op. R.668a).

With respect to the appropriateness of preliminary injunctive relief, the district court rejected GE's contention that a "flagrant" violations was prerequisite (Op. R.677a), stating that the remedy "is surely appropriate and available when the impact upon the publict interest is grave enough to justify swifter corrective action than the normal process of Board adjudication and court enforcement" (Op. R.676a). The court held that the present case "involving a huge and basic enterprise with substantial impact upon the national defense and economy generally, seems clearly to qualify" (Op. R.676a).

Recognizing that courts in a Section 10(j) proceeding are not "to displace the Board's primary decisional authority" (Op. R.677a) but issue an injunction if the Board establishes a "reasonable possibility" of ultimate decision against the respondent (Op. R.678a), the court determined "that the decision would go for the petitioner as a matter of independent judgment if such judgment were either required or permissible" (Op. R.678a).

### C. The Decision of the Court of Appeals

The court of appeals reversed (pp. 20-25 of petition, No. 645, O.T. 1966). It did not hold that the district court erred in finding that GE's conduct was illegal under established Board precedents or in finding that there was reasonable cause to believe that GE's con-

duct would ultimately be held illegal. Nor did the Court of Appeals find that the district court had erred in its balancing of the equities. The exact basis of the Court of Appeals reversal is not clear. Its conglomeration of objections to the district court's injunction was stated by the court of appeals as follows (pp. 23-24 of petition, No. 645 O.T. 1966):

> "The Board has not demonstrated that an injunction is necessary to preserve the status quo or to prevent any irreparable harm. Moreover, the basic legal question underlying its conduct—the very same question presented in the *American Radiator Case*, 155 NLRB No. 69 (1965) in which the Board did not see fit to seek an injunction—is a difficult one to resolve and one which no court has considered."

The Board's failure to seek an injunction in the *American Radiator* case while obviously irrelevant, is misleading because the American Radiator Company met with the expanded union committee, albeit under protest.

The circuit court further stated (p. 24 of petition, No. 645, O.T. 1966):

> "It would be more in keeping with the scheme intended by Congress to have this case follow the path of Board hearing and decision on the unfair labor practice charges, rather than to short-circuit the established administrative design. The Board cannot abdicate one of the prime purposes for which it was created and thus deprive the Court of the expertise which would be available to it in reviewing the Board's holding in an enforcement proceeding."

## REASONS FOR GRANTING THE WRIT

The Solicitor General has filed a petition for a writ of certiorari to review the judgment below, No. 645, O.T. 1966. We file the instant petition out of concern that the question presented as stated in the petition in No. 645 may not adequately present the basic issues respecting the proper use of injunctive procedures which should be decided by this Court and which are raised by the opinion of the court of appeals in reversing the injunction granted by the district court in the instant case. The question presented as stated by the Solicitor General in his petition, p. 2, makes the substantiability of the impact on the public interest of withholding injunctive relief one of the applicable criteria. We submit that any continued violation of the law which deprives employees of their rights under the Act during the processing of a case by the Board, affords sufficient basis for the issuance of the injunction, without need to prove any additional impact on the public interest. And the failure of the Solicitor General to include in his questions the status quo, irreparable harm and lack of Board expedition leaves us uncertain that this Court would deem itself free to consider those issues should only the Solicitor General's formulation of the question be before this Court.

If this Court is of the opinion that the questions presented as we state them are all encompassed within the question presented in No. 645 and if this Court should grant that petition for a writ of certiorari, we would have no desire to burden this Court with an additional proceeding.

1. We do respectfully submit that the questions which we present are in urgent need of decision by this

Court and that the opinion below unless reversed establishes a precedent which will greatly impede the legitimate use of the interlocutory injunctive process not only under the National Labor Relations Act but also under the Civil Rights Act of 1957 (42 U.S.C. 1971(c) and of 1964 (42 U.S.C. 2000a-3(a)) and at least 23 other federal statutes which expressly provide for the issuance prior to any final decision on the merits by either administrative agency or a court of temporary injunctions or other interlocutory relief in aid of the enforcement of federal law. See Appendix A, *infra*, p. 1a, *et seq.* Because interlocutory relief is usually decided by a district judge, and because few of these causes ever reach an appellate court, the unreversed opinion of the Court of Appeals for the Second Circuit in this case has an unusually far-reaching impact.

Most of the statutes which we have collected were repeatedly relied upon during the debates in Congress on the bill which became the Civil Rights Act of 1957 (103 Cong. Rec. 5764-5765) and again during the debates on the Civil Rights Act of 1964 (110 Cong. Rec. 6783-6784, 6802).[6] Senator Morse, who introduced the amendment which became Section 10(j) of the National Labor Relations Act as amended in 1947 (93 Cong. Rec. 1846, 2 Legis. Hist. LMRA 1947, p. 985), during the debates on the Civil Rights Act of 1964 listed the provisions of the National Labor Relations Act along with similar provisions in other federal statutes as affording a precedent which should be followed (110 Cong. Rec. 6784).

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[6] A list of 40 such statutes appears in the House Rept. No. 914, 88th Cong., 1st Sess. Report of House Judiciary Committee on H.R. 7152, Additional Views of Hon. George Meader, reprinted BNA, Incorporated, The Civil Rights Act of 1964, Legislative History, pp. 181-183.

Under each of the Civil Rights Acts the district courts have issued preliminary injunctions which could by no stretch of the imagination be deemed to maintain the status quo since restaurants who had never served Negroes were required to serve them[7] and registrars who had never registered Negroes were required to register them.[8] Federal Courts have similarly used preliminary injunctions to require admission of Negro pupils to theretofore all white schools.[9]

Under various of the Securities and Exchange Commission statutes, six of which expressly authorize interlocutory injunctive relief upon application of the SEC,[10] preliminary injunctive relief has been used to require publication of scalping practices,[11] and to cancel proxies,[12] neither of which can be deemed a mere preservation of the status quo *pendente lite.*

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[7] E.g. *Lance* v. *Plummer,* 5th Cir., 1965, 353 F. 2d 585, reciting issuance of preliminary injunctions by district court.

[8] E.g., *U.S.* v. *Logue,* 5th Cir., 1965, 344 F. 2d 290, 291, 293, reversing the district court for refusal to issue a preliminary injunction.

[9] *Carr* v. *Montgomery County Board of Education,* D.C.M.D. Ala., 1964, 232 F. Supp. 705; *Harris* v. *Gibson,* 5th Cir., 1963, 322 F. 2d 780, 782, certiorari denied, 376 U.S. 908; *Stell* v. *Savannah-Chatham County Board of Education,* 5th Cir., 1963, 318 F. 2d 425, 428, certiorari denied, 376 U.S. 908.

[10] *Security Exchange Act* of 1934, 15 USC § 78u(e); *Securities Act* of 1933, 15 USC 77t(b); *Investment Advisors Act* of 1940, 15 USC § 80b-9(e); *Investment Act* of 1940, 15 USC § 80a-41(e); *Public Utility Holding Company Act* of 1935, 15 USC § 79r(f); *Trust Indenture Act* of 1939, 15 USC § 77uuu(a).

[11] *SEC* v. *Capital Gains Bureau,* 375 U.S. 180, 182-184, 192-193 (1963).

[12] *SEC* v. *May,* S.D.N.Y. 1955, 134 F. Supp. 247, 258, affirmed, 2d Cir., 1956, 229 F. 2d 123, 55 A.L.R. 2d 1123. *SEC* v. *O'Hara Re-election Committee,* DCD Mass. 1939, 28 F. Supp. 523, 524, 525.

Numerous injunctions issued over the years under Section 10(j) have failed to meet the test of doing no more than preserving the status quo. Employers who have never bargained with any union have been required to bargain.[13] Employers engaged in bargaining with one union have been required to bargain with a different union.[14] Unions who had always bargained with individual employers have been required to bargain with an association.[15] A union was required by preliminary injunction issued under Section 10(e) to bargain with an association committee containing as one of its members a former confidential employee of the union.[16]

In none of these cases arising under the National Labor Relations Act or other statutes has there been imposed any requirement that a substantial impact on the public interest be shown. Indeed, where the issue respecting the need to show irreparable injury was raised, the courts have held that where the statute provided for interlocutory relief in aid of enforcing a federal statute there was no need to show irreparable

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[13] E.g., *Reynolds* v. *Curley Printing Co.*, D.C. M.D. Tenn. 1965, 247 F. Supp. 317; *Haban* v. *Connecticut Foundry Co.*, 62 L.R.R.M. 2139.

[14] *Madden* v. *Cargill, Inc.*, D.C. N.D. Ill. 1952, 30 LRRM 2459.

[15] *Madden* v. *U.M.W.*, D.C. D.C., 1948, 79 F. Supp. 616, 619; *Elliott* v. *Local 49, Sheet Metal Workers*, D.C. N.M. 1958, 34 *CCH Lab. Cas.* ¶ 71,553.

[16] *NLRB* v. *ILGWU (Slate Belt Apparel Contractors)*, 3rd Cir., 1959, 44 LRRM 2003, see also 274 F. 2d 376, 377, n. 2, 78 ALR 2d 763.

damage,[17] apparently on the theory that denial to any person of his rights under the statute while the case was being held in the merits in and of itself constituted irreparable damage.[18]

In *SEC* v. *Capital Gains Bureau,* 375 U.S. 180 (1963) this Court reversed a decision by the Second Circuit in which the Second Circuit affirmed the district court's denial of a preliminary injunction on the ground the SEC had not yet decided the substantive issues involved (300 F.2d 745, 751), that the SEC had selected a rather small advising service against which to secure a preliminary injunction (300 F.2d 745, 751) and that no irreparable injury had been established (300 F.2d at 745). In reversing and holding that a preliminary injunction, essentially affirmative in its effect and requiring practices of disclosure never before required, should have issued, this Court devoted its opinion entirely to the substantive issues of law and did not expressly rule on the procedural issues relevant to the use of preliminary injunctive relief. Nevertheless, this Court by implication rejected the principles applied again in this case by the Second Circuit.

Courts have already begun denying preliminary injunctions, relying on the decision below as a precedent. For instance, in *Greene* v. *A.G. Pollard Co.,* 54 L.C.,

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[17] *Hoban* v. *Connecticut Foundry Co.,* D. Conn. 1966, 62 LRRM 2139, 2140-2141; *SEC* v. *Torr,* 2d Cir. 1937, 87 F. 2d 446-450; *U.S.* v. *Brown Shoe Co.,* 1956 Trade Cas. 68,244 at p. 71114; *SEC* v. *General Security Co.,* S.D.N.Y. 1963, 216 F. Supp. 350, 352; *U.S.* v. *Chrysler Corp.,* D.N.J. 1964, 232 F. Supp. 651-657.

[18] Compare *Harris* v. *Gibson,* 5th Cir., 1963, 322 F. 2d 780, 782, certiorari denied, 376 U.S. 908.

¶ 11,477, the United States District Court for the District of Masachusetts on September 15, 1966, denied a preliminary injunction requested by the Labor Board to require an employer to bargain collectively. The district court relied upon the fact that "this controversy affects only a very small segment of the retail store industry and, much more importantly, the Board has indefinitely continued its determination of the merits of the controversy", citing and quoting from the decision below in the instant case respecting the lack of necessity to preserve the status quo, the failure to prove irreparable damage and the Board's abdication of its functions by applying to a court for an injunction before itself determining the case.

It is apparent that Congress has adopted on a wide scale the device of a preliminary injunction as a means of securing effective, immediate implementation of federal statutes. This Court has never laid down in clear, unmistakable terms the governing principles with respect to status quo, irreparable injury, delays in handling of the proceedings before the administrative agency, and impact on the public of denying an injunction. Such a decision is badly needed. The present case furnishes an excellent occasion for review of these issues by this Court.

2. The absence of any opinions by this Court explicating the applicable principles is, we believe, due not to any uncertainty on the part of this Court about the answers to any of the questions presented, but rather because this Court has assumed these principles were so well understood as not to need explication. For instance, the position that new issues should not be decided on an application for preliminary injunction and certainly not ahead of a decision by the adminis-

trative agency itself, upon which the district court and court of appeals relied, along with change of status quo and absence of irreparable injury, in denying a preliminary injunction in *SEC* v. *Capital Gains Bureau,* 191 F. Supp. 897, affirmed 2d Cir., 300 F.2d 745, 746, 751 (Clark dissenting) affirmed *en banc* by a 5 to 4 vote, 306 F.2d 606, was reversed *sub silentio* by this Court. 375 U.S. 180.

There can, we believe, on the basis of all the precedents, be no doubt but what the district court in the instant case did no more than follow applicable law in issuing the preliminary injunction and that the court of appeals erred in reversing. None of the bases of the court of appeals' decision find any support in the law applicable to preliminary injunctions nor in the statutory scheme adopted by Congress for the Labor Board and the courts jointly to enforce the labor policy enacted.

Even in applications for preliminary injunctions not resting on a statutory basis, there is no hard and fast rule that a preliminary injunction will not be used to change the status quo. For instance, preliminary injunctions are issued to grant specific enforcement of the affirmative obligations of a new contract, where delay would render the contract a nullity.[19] Preliminary injunctions may properly be used to create "a status which should have existed."[20] and of

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[19] *Rose* v. *Brown,* 1945, 186 Misc. 553, 556, 560, 58 N.Y.S. 2d 654, 656, 660.

[20] *Vicksburg, S. & P. Ry. Co.* v. *Webster Sand, Gravel & Const. Co.,* 1943, 132 La. 1051, 62 So. 140, 143-144, 47 LRA n.s. 1155. Cf. *Codept. Inc.* v. *More-Way Work Corp.,* 1964, 23 Wis. 2d 165, 127 N.W. 2d 29, 34; *Graham* v. *Bd. of Supervisors,* 1966, 49 Misc. 2d 459, 267 N.Y.S. 2d 383, 385, 388, Modified 25 A.D. 2d 250.

course under federal legislation providing for the use of preliminary injunctions to secure compliance with the law *pendente lite*, injunctions creating a legal status have issued, where the status quo was an illegal status.[21]

Nor is it clear that under traditional equity principles the preliminary injunction issued by the district court did anything but preserve the status quo. The status quo had been a bargaining relationship between GE and IUE. GE broke this relationship off because it did not like the constituency of the IUE's committee. The order did no more than require GE to bargain with the IUE committee as it had always done in the past. Never in the past had GE asserted any right to supervise who was to serve on the IUE committee.

A preliminary injunction requiring employees to interchange freight with strikebreakers, has been regarded as continuing the status quo respecting freight handling. That earlier the freight coming from the struck road required only dealing with fellow union members whereas the preliminary injunction required dealing with strikebreakers, was not regarded as creating a new status. See *In re Lennon,* 166 U.S. 548, 549-550, 556 (1887); *Toledo A.D. & N.M. Ry. Co.* v. *Pa. Co.,* 1893, 54 Fed. 730, 741 (per Taft, C.J.)

This Court has often decided new and novel issues of substantive law in determining whether a preliminary injunction should issue.[22] However here the point of

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[21] See cases cited notes 13, 14, 15, and 16, *supra.*

[22] *Texas & New Orleans Railroad Co.* v. *Bro. of Ry. & Steamship Clerks,* 281 U.S. 548, 555-556 (1930), the first injunction under the Railway Labor Act; *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952), enjoining the President's seizure of steel plants; *SEC* v. *Capital Gains,* 375 U.S. 180, 182, 183, 184, 192-193 (1963), the first judicial decision that investment advisers must disclose scalping practices to subscribers.

law determinative of the substantive issues of whether GE committed an unfair labor practice is in no respect novel. As the district court pointed out, the Sixth Circuit's 1963 holding in *Standard Oil Co.* v. *N.L.R.B.*, 322 F.2d 40, "rejected an employer position indistinguishable in principle from the one pressed here" and the decision of the district court in the instant case in deciding that GE committed an unfair labor practice "closely follows the rationale" of the Sixth Circuit's *Standard Oil* case (Op. R.668a).

Similarly, as the opinion of the district court also makes plain (Op. R.666a-668a) the *American Radiator* decision by the Board and the *Standard Oil* decisions by the NLRB and the Sixth Circuit, were themselves nothing novel but rather an obvious application of the express language of the statute, and uniform holdings of the Board and the courts throughout the years the National Labor Relations Act has been the law of the land, that on each side of the bargaining table representatives chosen either by the employees or by the employers respectively must be accepted by the other side without veto or question. The Board has considered innumerable cases in which employers have refused to bargain because of some objection they had to the personnel whom the union brought to the bargaining table to represent employees, often an objection that the representatives came from a union other than the one certified.[23] Similarly, unions on occasion

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[23] E.g., *Pacific Olive Co.*, 1942, 46 NLRB 5, 9, 12 (employer must meet with union committee including representative from Central Labor Council); *Deena Artware, Inc.*, 1949, 86 NLRB 732, 733, 747-750, enforced 6th Cir. 1952, 198 F. 2d 645-650-651 (employer must bargain with organizer employed by AFL to service AFL affiliates); *The Oliver Corp.*, 1947, NLRB 483, 484 (employer must bargain with international representative whom employer found

have objected to meeting with an employer committee including a lawyer or a labor relations consultant whom they have encountered representing other employers and deem unfair to labor.[24] In no reported case which we have been able to find has the Board ever dismissed a complaint alleging a refusal to bargain by either an employer or a union, on the basis that any individual who appeared as part of a negotiating committee warranted the refusal to meet with him.

In only two cases have the courts set aside Board orders in such cases—once where an employer was the respondent[25] and once where a union was the respondent.[26] Both cases turned on peculiar limited facts and afforded not the slightest basis for predicting that either the Board or the courts will refuse to find GE guilty of an illegal refusal to bargain.

Indeed, in cases brought under Section 10(j) of the National Labor Relations Act, no application can be made to a district court for an injunction unless the Labor Board itself authorizes the application. Because the Board itself must make the decision as to

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objectionable on the theory that the employer would thereby be compelled to bargain in a combined unit of factory and officer workers because the same international represented both units; *Sears Roebuck & Co., Inc.*, 1962 ,139 NLRB 471, 475 (employer must meet with committee including international representative of union). See annotation: Right to bargain with particular agent selected by opposing party, under National Labor Management Relations Act, 78 ALR 2d 768-775.

[24] E.g., *Local 294, Intl. Bro. Teamsters (K.C. Refrigeration Transport Co.)*, 1960, 126 NLRB 1, 2, 4 enforced 2d Cir., 1960, 284 F. 2d 893; *Southern California Pipe Traders (Paddock Pools)*, 1958, 120 NLRB 250, 261.

[25] *NLRB* v. *Kentucky Utilities Co.*, 6th Cir., 1950, 182 F. 2d 810, 813-814.

[26] *NLRB* v. *ILGWU (Slate Belt Apparel Contractors Association)*, 3rd Cir. 1960, 274 F. 2d 376, 78 ALR 2d 763.

whether interim relief will effectuate the policies of the Act before each Section 10(j) proceeding is initiated, such proceedings come before the Court bearing a governmental determination on policy issues. Section 10(j) requires that applications for interim relief under its provisions be made by the Board (29 U.S.C. 160(j). Section 10(1), on the other hand expressly requires application under its provisions to be made "if, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue" (29 U.S.C. 160(1)

The Board in its delegation of powers to the General Counsel expressly limited his power to apply for injunctions under Section 10(j) so as to require the submission of each case to the Board for its approval before the General Counsel had the power to apply. Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the NLRB effective April 1, 1955 (20 F.R. 2175), as amended August 12, 1959, 24 F.R. 6666), as amended April 28, 1961 (26 F.R. 3911, 4080). The Memorandum as now effective can be found printed in full in CCH Lab. Rel. Rep. Paragraph 1120.01 and BNA-LRX 4201.

This Court in *Garner* v. *Teamsters Union,* 346 U.S. 485, 489-490 (1953), relied upon the availability of injunctive relief pending Board determination as indicating Congressional intent to preempt all remedies for acts constituting unfair labor practices. There this Court cited (346 U.S. at 490, n. 6), as illustrative of the relief afforded in the district courts, *Madden* v. *U.M.W.A.,* 79 F. Supp. 616. In that case a preliminary injunction affirmative in character issued requiring the union to bargain with an association with which the

union had never dealt because the union believed it could properly deal with individual employers. All the issues decided by the circuit court below in the instant case were present at least impliedly in that case and were decided in the opposite manner.

3. The legislative history and statutory scheme of the National Labor Relations Act indicate that Congress intended the courts to grant preliminary injunctions in Section 10(j) proceedings where needed to secure effectuation of the statute without limiting the use of that section to unusual or emergency situations. Section 10(j) was offered as an amendment by Senator Morse to eliminate the one-sided character of the statute which resulted from Section 10(l) which made it mandatory on the regional staff of the Board to apply to the district court for a preliminary injunction in all secondary boycott cases, regardless of the impact upon the public and without first obtaining any approval from the Board itself as distinguished from its regional staff. In affording a discretionary right to the Board itself to apply for preliminary injunction in other cases, Congress certainly had no intent to make the Board's discretionary powers narrower than the mandatory command to proceed in every case of a union violation of Section 8(b)(4)(A), That the Congressional intent was for a far wider utilization of the Section 10(j) injunction that has heretofore occurred is evident from the report of a subcommittee of a committee of Congress criticizing the Board for not making greater use of Section 10(j).[27] In this report this subcommittee stated (at p. 1):

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[27] Report of Subcommittee on NLRB of the House Committee on Education and Labor, Administration of the Labor-Management Relations Act by the NLRB, 87th Cong., 1st Sess., pp. 1-3 (Committee Print, September 1961).

"The subcommittee finds that in many areas and in many industries, the policy of the United States as set forth in the Labor Management Relations Act of 1947—to encourage the practice and procedure of collective bargaining—is not being effectuated. Despite over 25 years of statutory prohibition and widespread publicity, the number of unfair labor practices grows, rather than diminishes, and at an alarming rate . . ."

And again (at p. 2):

". . . a partial reason for the caseload, and hence the delay in unfair labor practice cases, lies in the inadequate remedies of the Labor Board. Labor Board orders constitute in many situations no more than a 'slap on the wrist.' They are both too little and too late. They constitute, in the words of one witness, 'a license fee for union busting' . . ."

With respect to a remedy, this report stated (at p. 3):

". . . Nevertheless, this subcommittee finds that injunctions are now utilized extensively against union activities and to an almost nonexistent extent against employer unfair labor practices. Failure to utilize the 10(j) discretionary injunction often results in irreparable injury. This subcommittee, therefore, recommends that the Labor Board gave careful consideration to greater utilization of the 10(j) injunction in situations when unfair labor practice charges are filed and the Board finds reasonable cause to believe that such unfair labor practice is continuing and will be continued unless restrained, and will cause irreparable property or personal injury or injury to the exercise of rights guaranteed by section 7. Illustrative are the situations of flagrant and aggravated acts of picket line force and violence, the situations of repeated discharge of union adherents, and situations where employers or unions flagrantly refuse to bargain in good faith, and the

situations wherein the employer threatens to intimidate his employees by closing the plant or shifting work to affiliated factories."

For the manner in which the delays of the Board in securing any relief against refusals to bargain have frustrated the effectuation of the Act see Philip Ross, The Government as a Source of Union Power, Brown University, 1965, pp. 257-260.

In this setting the disastrous effect of the decision below on the development of the law is not difficult to predict.

The instant decision below will hinder on a wide spread basis the Board in carrying out its directions from Congress and deprive employees of effective protection while cases are processed by the Board.

## CONCLUSION

For the foregoing reasons it is respectfully urged that this petition for a writ of certiorari be granted and that the judgment below be reversed with the direction to affirm the preliminary injunction issued by the district court.

Respectfully submitted,

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November 14, 1966

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## APPENDIX A

The following Federal statutes expressly authorize the use of a temporary injunction to compel compliance with the statute prior to, and pending, a decision on the merits by either an administrative agency or a court:

Antitrust laws, application to be made by U.S. attorney under direction Attorney General, 15 U.S.C. 4, July 3, 1890.

Atomic Energy Act, enjoining violation of act or regulation—by Atomic Energy Commission by Attorney General, 42 U.S.C. 2280, as amended August 6, 1956.

Civil Rights Act of 1957, Attorney General may ask for injunctive relief to prevent illegal practices relating to voting rights, 42 U.S.C. 1971(c), September 9, 1957.

Civil Rights Act of 1964, any person aggrieved by violation of public accommodations sections may apply, 42 U.S.C. 2000a-3(a), July 2, 1964.

Clayton Act, application to be made by U.S. attorney under direction of Attorney General, 15 U.S.C. 25, October 15, 1914.

Defense Production Act, 50 U.S.C. appendix 2109, July 31, 1951.

Electric utility companies, application to be made by Federal Power Commission, 16 U.S.C. 825m, (a), August 26, 1935.

False advertisements, dissemination enjoined by Federal Trade Commission, 15 U.S.C. 53, March 21, 1938.

Flammable Fabrics Act, to enjoin violation by Federal Trade Commission, 15 U.S.C. 1195, June 30, 1953 (a).

Fur Products Labeling Act, to enjoin violation by Federal Trade Commission, 15 U.S.C. 69g, (b) (2), August 8, 1951.

Import trade, prevention of restraint by injunction by U.S. attorney, under direction of Attorney General, 15 U.S.C. 9, August 27, 1894.

Investment Act of 1940, violation of statute or rules, regulation, or orders of SEC by investment companies, enjoined by Securities and Exchange Commission, 15 U.S.C. 80a-41(e) August 22, 1940.

Investment Advisers Act of 1940, violations of statute, rules and regulations governing, enjoined by Securities and Exchange Commission, 15 U.S.C. 80b-9(e), August 22, 1940.

National Housing Act, injunction against violation by Attorney General, 12 U.S.C. 1731b.

National Labor Relations Act (Taft-Hartley Act), 29 U.S.C. 160(j) and (L), June 23, 1947.

Natural Gas Act, 15 U.S.C. 717s, June 21, 1938.

Public Utility Holding Company Act of 1935, 15 U.S.C. 79r(f), August 26, 1935.

Rent Control Statute, 50 U.S.C. 1896, March 30, 1949.

Securities Exchange Act of 1933, actions to restrain violations by Securities and Exchange Commission, 15 U.S.C. 77t(b), May 27, 1933.

Securities Exchange Act, restraint of violations by Securities and Exchange Commission, 15 U.S.C. 78u, June 6, 1934.

Small Business Investment Act Amendments of 1961. Injunctive relief is authorized to restrain violations, 15 U.S.C. 687c (a), October 3, 1961.

Textile Fibre Products Identification Act, Federal Trade Commission may seek injunctive relief to restrain unlawful acts, 15 U.S.C. 70f, September 2, 1958.

Trust Indenture Act of 1939, 15 U.S.C. 77uuu (a), August 3, 1939.

Welfare and Pension Plans Disclosure Act Amendments of 1961. Injunctive relief to enjoin improper acts or practices. 29 U.S.C, 308(f), March 20, 1962.

Wool products, enjoining violation of Labeling Act by Federal Trade Commission, 15 U.S.C. 68e, October 14, 1940.